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THE FAIR EMPLOYMENT PRACTICE ACT

FEBRUARY 20, 1945.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mrs. NORTON, from the Committee on Labor, submitted the following

REPORT

[To accompany H. R. 2232]

The Committee on Labor, to whom was referred the bill (H. R. 2232) to prohibit discrimination in employment because of race, creed, color, national origin, or ancestry, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

One of the principal objectives of the tragic war in which we are now engaged is to establish the principle that all men, no matter what their religion, color, or national origin, are born with the right to freedom to worship and work to safeguard their spiritual and economic welfare. The men and women of America hold this belief so dear that they are fighting and dying on the battlefields of the world to uphold it. When the war comes to a victorious end, and our men and women return to peacetime occupations from the battlefields and from the production of war materials, there must be equal opportunity for all. The men who have fought for economic freedom for peoples throughout the world will not, and should not, be satisfied with anything less in our own country.

Let it be clearly understood this bill has for its purpose economic opportunity only. The opponents of the bill are attempting to confuse the issue by bringing up the question of social equality. We repeat, there is nothing in the bill concerned with anything other than economic equality.

The Presidential candidates of both parties specifically pledged themselves to support of a permanent Fair Employment Practice Commission. At the beginning of this session of the Seventy-ninth Congress, 13 bills, having the same purpose, were introduced and referred to the committee. The provisions of 10 of these bills are identical. The bills are as follows: H. R. 481, introduced by Mr. LaFollette, of Indiana; H. R. 679, by Mr. Baldwin of New York; H. R. 700 by Mr. Dawson, of Illinois; H. R. 1370, by Mr. Hook, of

Michigan; H. R. 1575, by Mr. Dirksen, of Illinois; H. R. 1743, by Mr. Powell, of New York; H. R. 1762, by Mr. Bender, of Ohio; H. R. 1806, by Mrs. Douglas of California; H. R. 1815, by Mr. Clason, of Massachusetts; and H. R. 1894, by Mr. Doyle, of California. The bill H. R. 523, introduced by the chairman, was based very largely on the provisions of the above identical bills.

These proposals were considered by a subcommittee composed of Mr. Randolph, of West Virginia; Mr. Patterson, of California; Mr. Geelan, of Connecticut; Mr. Powell, of New York; Mr. Baldwin of New York; Mr. McConnell, of Pennsylvania; and Mr. Adams, of New Hampshire. After full consideration, the subcommittee recommended to the full committee a bill embodying the best features of all of the above proposals. Upon completion of comprehensive discussion by the full committee of the recommended bill, the committee requested the chairman to introduce, as a committee bill, a bill carrying out these recommendations. It is that bill, H. R. 2232, which is herewith reported.

Analysis of the Bill

The following is an analysis, section by section, of the recommendations of the committee.

SECTION 1. SHORT TITLE

This section gives the act its title, the Fair Employment Practice Act.

SECTION 2. FINDINGS AND DECLARATION OF POLICY

This section sets forth the underlying factual basis and policy for the regulation provided by the bill. The Congress finds that discrimination in employment because of race, creed, color, national origin, or ancestry (1) leads to interracial tension and conflict, (2) forces large segments of our population permanently into substandard conditions of living, (3) creates a drain upon the resources of the Nation, (4) causes a diminution of employment and wages which disrupts the market for goods in commerce, all of which (5) burden, hinder, and obstruct commerce.

SECTION 3. DEFINITIONS

This section defines in ordinary terms the words, person, labor union, commerce, affecting commerce, and Commission. The term employer is defined, however, to exclude all employers of five or less employees.

SECTION 4. RIGHT TO FREEDOM FROM DISCRIMINATION IN EMPLOYMENT

This section declares that the right to work free from discrimination is an "immunity" of the citizens of the United States, which shall not be abridged by any Federal or State agency.

SECTION 5. UNFAIR EMPLOYMENT PRACTICES DEFINED

This section seeks to outlaw discriminatory practices by three major groups, private employers, labor unions, and agencies of the

Federal Government. It forbids discrimination in every incident of the employment relationship. Thus it would make unlawful a discriminatory refusal to hire, refer, upgrade, promote, or classify properly. It is designed to forbid wage differentials based upon race, discriminatory transfers, or assignments, discriminatory discharges, and discrimination in the application of seniority rules. It likewise seeks to ban the various devices by which discrimination is effected. The bill also forbids an employer to confine his hiring to any source that discriminates.

The section also seeks to forbid discriminatory practices by trade unions. It forbids them to deny membership because of race, creed, color, national origin, or ancestry or to discriminate among members because of such facts.

In addition, the section seeks to protect those persons who suffer discrimination not because of race or creed, but because they seek to assist their fellow employees who belong to a minority group. Thus it forbids discrimination against employees who oppose discrimination or who assist in any proceeding under the bill.

Having stated the objective of extirpating every form of discrimination in employment, no matter how occasioned, devised, or motivated, it should likewise clearly be stated what the bill does not seek to do. The bill is not concerned with matters other than employment, such as housing, education, recreation, transportation, political rights, or social relationships.

SECTION 6. FAIR EMPLOYMENT PRACTICE COMMISSION

This section creates a quasi-judicial agency to be known as the Fair Employment Practice Commission, to consist of five members appointed by the President for 5-year terms with the advice and consent of the Senate. The original members will serve, however, for terms ranging from 1 to 5 years. Commissioners will receive $10,000 a year. When a quorum of the new Commission has taken office, the present Committee on Fair Employment Practice created by Executive order 9346 will go out of existence, but its records, employees, and unexpended appropriations will be transferred to the new Commission.

SECTION 7. PREVENTION OF UNFAIR EMPLOYMENT PRACTICES

The Commission is empowered to prevent the proscribed unfair employment practices by the issuance of cease-and-desist orders. The procedure devised by this section for the issuance of such orders follows closely that of other administrative agencies. Thus the section provides for the filing of charges with the Commission, the holding of hearings before it, the making of findings of fact, the issuance of cease-and-desist orders.

The Commission is empowered to prevent those unfair employment practices which are committed by Federal agencies or by Federal contractors or which affect commerce.

SECTION 8. JUDICIAL REVIEW

This section incorporates, by reference, the procedure for judicial review and enforcement of the Commission's orders, which is now applicable to the orders of the National Labor Relations Board. The

technical, common-law rules of evidence will not be binding upon the Commission, but in conformity with existing judicial doctrine it will receive or consider only the type of evidence which—

usually affects fair-minded men in the conduct of their daily and important affairs (*Bene* v. *F. T. C.*, 229 Fed. 468).

Any party aggrieved by a final order of the Commission may, on his own initiative, obtain a review of such order in the circuit courts.

No penalty is provided for a violation of an order of the Commission. If, however, a court commands obedience to such an order, violation of the court's decree will be punishable as a contempt of court.

SECTION 9. INVESTIGATORY POWERS

This section confers upon the Commission the customary powers of subpena and administration of oaths. The subpenas are enforceable in the Federal district courts.

SECTION 10. RULES AND REGULATIONS

This section empowers the Commission to issue regulations necessary to carry out the provisions of the act, but provides that the two Houses of Congress may disapprove any regulation by the adoption of a concurrent resolution within 60 days after the issuance of such regulation. After adoption of such a resolution the Commission would be barred from issuing another regulation having the same effect as the one disapproved. Thus continual congressional supervision of the Commission's regulations is provided for.

SECTION 11. GOVERNMENT CONTRACTS

This section continues the existing requirement of Executive Order 9346 issued by the President, that every contract to which the Federal Government is a party shall contain a covenant obligating the contractor and his subcontractors not to discriminate in employment because of race, creed, color, national origin, or ancestry. This obligation is in effect only during the period of time required for the performance of the contract.

This section also provides that in the discretion of the Commission it may require that a person found to have violated any of the provisions of the act shall be barred from receiving another Government contract for a period of not to exceed 1 year. This section is based upon a similar provision in the Walsh-Healey Act of 1936 (41 U. S. C. 35).

SECTION 12. ENFORCEMENT OF ORDERS DIRECTED TO GOVERNMENT AGENCIES

This section provides for a means of enforcing the Commission's orders against Federal agencies or their officers who have been found to be guilty of discriminatory employment practices. The Commission is empowered to request the President to take any action he deems appropriate to obtain compliance with the order of the Commission. Thus the President may discharge summarily any Federal

employee or officer who, in the President's opinion, has willfully failed to obey an order of the Commission.

A Federal agency named as a respondent in a Commission order will have no right of appeal to the courts.

SECTION 13. WILLFUL INTERFERENCE WITH COMMISSION AGENTS

This section, customary in comparable regulatory statutes, protects agents of the Commission from physical harm as willful interference. This section is not applicable to the committing of unfair employment practices or the violation of the orders of the Commission.

SECTION 14. SEPARABILITY CLAUSE

This section expresses the intent of Congress that the act shall be deemed separable in the event of a decision of unconstitutionality affecting only a portion of the act.

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MINORITY VIEWS OF REPRESENTATIVE CLARK FISHER, OF TEXAS

I am wholly unable to agree with the members of the Labor Committee who voted to report H. R. 2232. The bill sets up a permanent Fair Employment Practice Commission, composed of five members with 5-year overlapping terms, each member to draw an annual salary of $10,000. The proposal makes it unlawful for any employer engaged in interstate commerce having more than five employees to refuse to hire, to discharge, or to refuse to promote any employee or applicant for employment because of such person's race, creed, color, national origin, or ancestry. It forbids labor unions from excluding from membership or from expelling any person for a like reason.

By the terms of section 10 of the bill the Congress would delegate to the Fair Employment Practice Commission the power to enact its own rules and regulations, including its own rules of evidence to be used in the trial of cases. A provision is inserted, however, to the effect that when new rules are announced by the Fair Employment Practice Commission the Congress may, by concurrent resolution, veto such rules, provided such action should be completed within 60 days from the date the rules were made. If, however, the resolution should not be introduced and passed within the time limit, or if the President should veto it and his veto should not be overridden, the rules would automatically become effective and would no longer be subject to review by the Congress.

The Fair Employment Practice Commission could, according to the bill, designate one of its members or designate any number of agents, any one of whom could be empowered to conduct trials against employers anywhere in the land. There is no limit on the number of such agents who could be appointed. Witnesses could be subpenaed and forced to attend from any place in America. The qualifications of such one-man courts would be determined not by Congress but by the Fair Employment Practice Commission in accordance with its rule-making power. The Commission or any of its agents would, according to section 9 of the bill, have the power to enter private business places and there conduct searches, examine and copy any evidence of any person being investigated or proceeded against by such agent. The bill makes no requirement as to probable cause for such search or the need for a search warrant. If the victim should "willfully resist, prevent, impede, or interfere" with such a search, he would thereby become a criminal and subject to a fine of not more than $5,000 or by imprisonment for not more than 1 year, or both (sec. 13).

Section 6 (f) of the measure provides that all employees of the present Fair Employment Practice Commission shall be transferred to, and become employees of, the permanent Fair Employment Practice Commission. This means that the Congress by the passage of this bill would of its own initiative endorse, approve, and rehire

each and every present employee of the Fair Employment Practice Commission. The names of said employees are set out on page 258 of the hearings. It might not be amiss to point out that said employees include a number who have subversive records, according to the records of the House Committee on Un-American Activities and according to the findings made by the Attorney General of the United States.

A businessman or farmer against whom a disappointed job seeker should file a complaint would not, if this bill should be enacted, be allowed a jury trial. He could not seek redress in local courts. He would be at the complete mercy of the Fair Employment Practice Commission in Washington and the agent who happened to be in charge of his prosecution. If found guilty, the victim could be forced to desist from the practice complained of and, in addition, could be forced to hire, rehire, or promote the complainant, as the case might be, with back wages from the time the alleged act of discrimination occurred.

But the proponents point with pride to section 8 of the bill and say it is not so bad after all because the victim is entitled to have his conviction reviewed by the courts. They imply that such right would protect the defendant against injustices that might be imposed upon him by the denial of the right of a trial by jury. That contention, however, is very misleading. It is one of the many "jokers" in the bill. Section 8 is really hollow and meaningless, as everyone knows who has studied it. What does section 8 provide and what protection does it give to the employer? It provides Fair Employment Practice Commission enforcement orders are subject to judicial review—

in the same manner, to the same extent, and subject to the same provisions of law, as in the case of the National Labor Relations Board.

What does the National Labor Relations Act provide in cases of judicial review? The act provides that the defendant may petition—

any circuit court of appeals of the United States * * *, or if all the circuit courts of appeal to which application may be made are in vacation, any district court of the United States * * *.

Now, what would the circuit court pass on where a "judicial review" is requested by the victim of a Fair Employment Practice Commission order? The court would pass only on the regularity of the general procedure followed in the case—whether a complaint was properly filed, etc. But section 10 (e) of the act provides:

The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

In other words, the reviewing court would not have the power to pass on the credibility of witnesses who testify in the hearings before the Fair Employment Practice Commission agent. It would not pass on the truth or falsity of testimony. It would not pass on the issue of whether it should be considered a trumped-up lawsuit by a blackmailer or shyster. It would not pass on the fallacy of the findings made by the Fair Employment Practice Commission agent and the bureau in Washington. It would not be permitted to pass judgment on the effect the Fair Employment Practice Commission order might have on the defendant's business or on the morale of other employees. No; the court is allowed only to examine the record in

such a case to ascertain if the order objected to is "supported by evidence," and if the technical proceedings were complied with.

In such a case the testimony of the disgruntled job seeker, to the effect that he was qualified to fill the position sought, etc., and was denied a job or was discharged "because of his race," would in itself sustain the order because the order would then be "supported by evidence." That would be true regardless of what the employer's evidence might be. Therefore, for all practical purposes the right of "judicial review" means exactly nothing insofar as the protection of the rights of the employers is concerned. I, therefore, repeat for emphasis: The wisdom of employment practices and the valuable property rights of employers would, by the terms of this bill, be at the complete mercy of the whims and prejudices of the Fair Employment Practice Commission and its agents. Their findings on the facts "sustained by evidence" would be subject to no review whatever in the courts.

The bill gives the Fair Employment Practice Commission jurisdiction over all Government agencies. This would include control over all employees of the District of Columbia, and would apply to school teachers, firemen, and policemen. It would also apply to Members of Congress and to the Judiciary.

Section 4 of the bill attempts to give the new bureau jurisdiction over the States and over "an instrumentality or creature of the United States or of any State." That is, of course, directed at the various State highway departments, counties, cities, school boards, etc.—all of which are "creatures" of the State.

My reasons therefore for opposing H. R. 2232 include the following:

I

The bill would delegate tremendous legislative and judicial powers to a Government bureau whose decisions and orders would be supreme. Those powers of control and regimentation would vitally affect the private property rights of the people against whom they should be exercised. Moreover, the victims of such arbitrary actions would have no recourse or control over the men who would thus judge them and govern them. Such a scheme is contrary to my concept of the meaning of democratic representative government.

II

The measure would set up a colossal peacetime bureaucracy. It would authorize the indiscriminate employment of employees and agents without limitation as to number. It is a move to perpetuate and make permanent a temporary, wartime agency and to prolong its existence long after the emergency ends. It delegates to that agency increased and dangerous powers of control and regimentation far beyond anything ever before proposed in this country. The bill should appeal to those who believe in government by bureaucracy and others who do not have faith in government by representatives of the sovereign people who are responsible to the will of the people being governed.

III

The bill is a departure from the traditional American system of free enterprise with respect to the right that has always been enjoyed by employers to use their own sound judgment and discretion in selecting loyal and capable employees. Under the American system of competitive free enterprise, a man has been able to excel and make progress because of his ability to judge men and surround himself with employees whom he could trust and who would produce more and better goods and services. It is through that system of competition and improvement that private enterprise has succeeded in America when it has failed in other countries. It therefore follows that the proposal to deprive the businessman and farmer affected by this bill of the basic privilege of passing judgment on the choice of his employees, and of transferring that final determination to a bureau in Washington, smacks strongly of totalitarianism.

IV

The bill, if enacted, is extremely unfair to the Negro race in America, for whose alleged benefit it is designed. The measure would be unenforceable. Its attempted enforcement would have the natural effect of resulting in strikes, riots, and violence and bringing about racial prejudices and discrimination. It is manifestly unfair to the American Negro because it would retard his progress and would be calculated to foment racial feeling and bitterness against him.

V

The proposal, if enacted, would set the stage for a new era of racketeering and blackmailing in America. It would result in thousands of lawsuits being filed by troublemakers and professional agitators. Businessmen and farmers will have a big enough problem of trying to succeed in their business enterprises, pay their tax bill, provide jobs, and help maintain a strong economy in the post-war years without having added to their burdens this additional program of harassment and bureaucratic interference.

Any disappointed job seeker would be enabled to file a complaint with a Fair Employment Practice Commission agent, and thereby, with the Government furnishing him a champion and a trained attorney, be enabled to force the employer to suspend his own work and be hailed into court for a hearing before the all-powerful Fair Employment Practice Commission agent. This set-up would invite thousands of trumped-up lawsuits by the shysters who would hope to settle with the employer for a price. Prejudice would thus become a commodity to be bootlegged. The measure would therefore legalize and dignify the activities of those who would practice shysterism and blackmail in this country.

CLARK FISHER.

MINORITY VIEWS OF REPRESENTATIVE CLARE E. HOFFMAN, OF MICHIGAN

The bill is based upon certain findings of fact and a declaration of policy. If the findings be erroneous, or the declaration of policy unsound, the bill should be recommitted.

FINDINGS

The reason given for the adoption of this proposed legislation is that, due to discrimination because of race, creed, color, national origin, and ancestry, less than a full measure of employment (*a*) has caused industrial strife; (*b*) forced large groups of our population into permanently substandard living conditions, which, in turn, has (*c*) created a drain upon the resources of the Nation, (*d*) a permanent threat to industrial peace and to a standard of living necessary to the health, efficiency, and well-being of workers.

To give Congress jurisdiction to enact legislation to end the discrimination, it is charged that such discrimination in industries engaged in commerce, or in the production of goods for commerce, causes the spread of such discrimination and a diminution of employment and wages to such an extent that it impairs and disrupts the market for goods and obstructs commerce.

The bill then states the obvious fact that individuals should have the right to work without discrimination because of race, creed, color, national origin, or ancestry; but it pointedly ignores the equally obvious fact that individuals have the right to work without discrimination because of membership or nonmembership in a labor union.

DECLARATION OF POLICY

The declaration of policy is somewhat like the false front on the country store, in that, instead of being a two-story measure to end discrimination against the worker, it wholly ignores the discrimination which permits the levying of a tax upon the overwhelming majority of workers, bars thousands of others from the more lucrative jobs, and makes no effort at all to eliminate, even in wartime, the principal cause of industrial strife which has cost millions of man-days of work.

The foregoing is true for the reason that, while the bill avers that it is the policy of Congress to protect the right to work without discrimination because of race, creed, color, national origin, or ancestry, it makes no attempt to end the discrimination practiced because of lack of union membership.

It takes no more than a moment's consideration to show that the bill is not one to end discrimination against workers as a class, for, under it, a black, yellow, or brown individual, be he Jew, Catholic, Protestant, atheist, or infidel, if he be a member of a union, is protected, while, though he be white, a Jew, Catholic, or Protestant,

but not a member of a union, he may seek employment in vain. Even his Government will in many cases issue an order requiring him to become or to remain a member of a union.

REASON FOR PROPOSED LEGISLATION

In truth and in fact, while the avowed purpose of the bill is to end discrimination, give equality of opportunity, in employment, another objective is to bring about, through Federal legislation, a social intermingling (and some advocate intermarriage) among the races.

Others support the bill because it is believed that, by so doing, the political support of the Negro as a race can be obtained for certain candidates or partisan measures. Neither major party is without sin in this last respect.

THE BILL'S SUPPORTERS

Good citizens, sincere in their convictions, in a hurry to see all Negroes in possession of jobs, homes, and as well educated and financially established as is the average white, believe this legislation will do for the Negro what others think can be accomplished only by time and education.

Others, professional reformers, without convictions of any kind, see in the bill an opportunity to reap a rich financial reward through the exercise of their professional talents as creators of unrest and the advocacy of controversial legislation.

Still others supporting the bill—and reference has been made to them—are so-called "smart" politicians, who think that the holding out before the Negro, not only of the justifiable hope of equal opportunity for employment, but the vision of an immediate Utopia, where all men will intermingle, intermarry, will secure for them the support of the Negro voter.

While the bill by its terms is all-inclusive, practically it offers additional opportunity to the members of but one race, the Negro.

The Negro, because of the circumstances under which he was brought to this country and because of conditions beyond his control which have since existed, has not, as a race, made the same advancement as have members of other races.

Today, few indeed are those who would deny to the Negro equality of opportunity; but there are many who have the future welfare of the Negro at heart, who desire to assist him in every way, who are firmly convinced that, while he should be given equality of opportunity, yet moral and social inhibitions and inborn race prejudices cannot be wiped out by legislation.

Once upon a time, not so long ago, a majority of our people by a constitutional amendment attempted to end the excessive use of spirituous and intoxicating liquor. That noble experiment should make us cautious in attempting to accomplish by legislation that which only education and tolerance can bring about.

The fate of this bill should be decided, not upon any false premise but upon a consideration of how the Negro can best be given equality of opportunity, not only for employment but for education and the exercise of his religious freedom.

Since the war between the States, the advancement of the Negro in economic and educational fields has been marvelous. Through the practice of tolerance, through education, a sure and sound progress will be made and the goal desired by Negro and by white alike will finally be reached.

The forcing of the issue through legislation by sincere but misguided individuals, by professional reformers and soap-box orators, by cunning politicians, will, in my judgment, delay the attainment of a greatly desired end.

METHOD

Both major parties have promised, and our people desire, an end to the creation of additional bureaus, commissions, and agencies.

Experience under New Deal agencies, such as the National Labor Relations Board, the Office of Price Administration—yes, and even our recent experience with General Hershey, Director of the Selective Service System—has demonstrated that the departure from constitutional procedure, the issuing of rules, orders, and directives as the substitutes for laws and the decisions of courts, does not aid in giving our people equal justice under law.

It took the Anglo-Saxon race hundreds of years to obtain, establish, and, to a large degree, perfect the judicial system, which still, in spite of attempts to destroy it, is the most efficient method of administering justice between individuals ever created.

This bill creates another commission. It legalizes an executive agency which, in its own official family, has disregarded the principle of equality of opportunity, of representation.

If this bill is made legislation, the taxpayers will have thrust upon their already overburdened shoulders not only an additional tax burden, but an agency under which the individual's right to a trial by jury will be denied him.

THE ALTERNATIVE

If a majority of the Congress believes that legislation against discrimination should be enacted, then our time-tried and time-proven system, which guarantees to the individual due process of law, should be adopted, and the protection of the rights which this bill proposes to give should be entrusted to the judicial branch of our Government.

If so entrusted, a judge, learned in the law, free from political influence, will interpret the act; a jury will pass upon the facts; the accused will not be subject to a punishment imposed by some bureaucrat, by some partisan, by some crackpot, whose sole qualification is loyalty to a theory, ignorance of realities.

Discrimination, if such exists, can be prevented, adequate redress given, through the use of the judicial machinery already in existence. No additional cost, except perhaps for the payment of some additional clerical and stenographic assistance, would be imposed.

At present, there is a deplorable lack of confidence in the fairness, the integrity, the efficiency, of administrative agencies. The courts still retain the confidence of the people.

Entrusting the administration of any legislation which it is deemed wise to adopt to the judicial branch of our Government is imperative if we are to retain our constitutional rights and processes.

The possibilities for the exercise of tyranny under the interpretation and administration of this bill, or any other legislation of its nature, are so apparent that the creation of an executive agency to interpret and administer it would be but another transfer of a portion of the power of the judicial to the executive branch of the Government—another step toward dictatorship.

Respectfully submitted.

CLARE E. HOFFMAN.

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